

United States District Court
Northern District of California

JO ANN O'CONNOR and ROBERT H.
O'CONNOR,
Plaintiffs,
v.
CAPITAL ONE, N.A.,
Defendant.

Case No.: CV 14-00209-KAW

ORDER GRANTING DEFENDANT
CAPITAL ONE, N.A.'S MOTION TO
DISMISS

On February 7, 2014, Defendant Capital One, N.A. filed a motion to dismiss Plaintiffs Jo Ann and Robert H. O'Connor's complaint. (Def.'s Mot. to Dismiss., "Def.'s Mot.," Dkt. No. 5.)

On May 15, 2014, the Court held a hearing, and after careful consideration of the parties arguments and the applicable legal authority, and for the reasons set forth below, GRANTS Capital One's motion to dismiss. The Court also GRANTS Plaintiffs permission to file, within 30 days, a motion for leave to file an amended complaint consistent with this order.

I. BACKGROUND

On or about May 3, 2013, Plaintiffs allegedly received a notice from Defendant Capital One concerning the property located at 75940 Nelson Lane, Palm Desert, CA ("Subject Property"). (Compl., Dkt. No. 1 ¶ 6, Ex. A.) Addressed to Plaintiff Jo Ann O'Connor, the notice concerned "an alleged loan, mortgage, [and/or] Deed of Trust." (Compl. ¶ 6, Ex. A.)

On July 29, 2013, Plaintiffs served Defendant with a Notice of Validation of Debt. (*Id.* at ¶ 7, Ex. B.) Plaintiffs claim that the notice required Defendant to validate or verify Plaintiffs' alleged debt pursuant to the Fair Debt Collection Practice Act ("FDCPA"). *Id.* Plaintiffs never received a response from Defendant. (Compl. ¶ 8.)

On November 22, 2013, Plaintiffs allegedly obtained a copy of their consumer credit reports from Equifax, Experian, and Transunion, and discovered that Defendant reported their

1 alleged debt to all three agencies. (Compl. ¶ 9.) On or around November 22, 2013, Plaintiffs
2 immediately disputed those entries with the credit reporting bureaus pursuant to the Fair Credit
3 Reporting Act (“FCRA”). *Id.* Plaintiffs further allege that, at the time of filing the complaint, the
4 “erroneous information” was still on their credit report. *Id.*

5 Plaintiffs claim that Defendant engaged in deceptive and illegal acts in its attempt to
6 collect Plaintiffs’ alleged debt. (Compl. ¶ 11.) Plaintiffs assert that the FDCPA, FCRA, and
7 California consumer protection laws apply even if Defendant was collecting a legitimate debt, and
8 further asserts that Defendant is not a creditor, since it did not provide Plaintiffs any credit. *Id.*
9 Instead, Plaintiffs allege that Defendant is a “debt collector” pursuant to the FDCPA. *Id.*

10 Plaintiffs alleges that they have suffered “significant economic harm” as a result of
11 Defendant’s erroneous credit reporting. (Compl. ¶ 10.)

12 On January 14, 2014, Plaintiffs Jo Ann and Robert H. O’Connor, proceeding pro se,
13 filed this case against Defendant Capital One consisting of four causes of action¹: (1) violation
14 of FCRA; (2) invasion of privacy; (3) negligent, wanton, and/or intentional hiring and
15 supervision of incompetent employees or agents; and (4) violation of the FDCPA.

16 On February 7, 2014, Defendant filed a motion to dismiss the complaint. On March 10,
17 2014, Plaintiffs filed their opposition. (Pls.’ Opp’n, Dkt. No. 18.) On March 14, 2014,
18 Defendant filed its reply. (Def.’s Reply, Dkt. No. 21.)

19 II. LEGAL STANDARD

20 A. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

21 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the
22 failure to state a claim upon which relief may be granted. A motion to dismiss based on rule
23 12(b)(6) challenges the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of*
24 *Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

25 In considering a 12(b)(6) motion, the court must “accept as true all of the factual
26 allegations contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)

27 ¹ Plaintiffs’ Complaint contains four causes of action, but they are misnumbered and they do not
28 assert a second or a fifth cause of action. The Order, however, will address them as they are
numbered in the Complaint for the purposes of consistency.

1 (citation omitted), and may dismiss the case “only where there is no cognizable legal theory” or
2 there is an absence of “sufficient factual matter to state a facially plausible claim to relief.”
3 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing
4 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
5 2001)) (quotation marks omitted).

6 A claim has facial plausibility when a plaintiff “pleads factual content that allows the
7 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
8 *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate
9 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
10 will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Threadbare recitals of the
11 elements of a cause of action” and “conclusory statements” are not adequate. *Iqbal*, 556 U.S. at
12 678. “The plausibility standard is not akin to a probability requirement, but it asks for more than
13 a sheer possibility that a defendant has acted unlawfully.... When a complaint pleads facts that are
14 merely consistent with a defendant's liability, it stops short of the line between possibility and
15 plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal citations
16 omitted).

17 Generally, if the court dismisses the complaint, it should grant leave to amend even if no
18 request to amend is made “unless it determines that the pleading could not possibly be cured by
19 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting
20 *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

21 **B. Request for Judicial Notice**

22 As a general rule, a district court may not consider any material beyond the pleadings in
23 ruling on a 12(b)(6) motion to dismiss for failure to state a claim. *Lee v. City of Los Angeles*, 250
24 F.3d 668, 688 (9th Cir. 2001). A district court may take notice of facts not subject to reasonable
25 dispute that are “capable of accurate and ready determination by resort to sources whose accuracy
26 cannot reasonably be questioned.” Fed.R.Evid. 201(b); *United States v. Bernal-Obeso*, 989 F.2d
27 331, 333 (9th Cir.1993). “[A] court may take judicial notice of ‘matters of public record,’” *Lee*,
28 250 F.3d at 689 (citing *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and

1 may also consider “documents whose contents are alleged in a complaint and whose authenticity
2 no party questions, but which are not physically attached to the pleading” without converting a
3 motion to dismiss under Rule 12(b)(6) into a motion for summary judgment. *Branch v. Tunnell*,
4 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cnty. of Santa*
5 *Clara*, 307 F.3d 1119 (9th Cir. 2002). The court need not accept as true allegations that
6 contradict facts which may be judicially noticed. *See Mullis v. United States Bankruptcy Ct.*, 828
7 F.2d 1385, 1388 (9th Cir. 1987).

III. DISCUSSION

9 Defendant seeks to dismiss the instant action under Federal Rule of Civil Procedure
10 12(b)(3), on the grounds that venue is improper, as well as under Federal Rule of Civil Procedure
11 12(b)(6), on the grounds that Plaintiffs cannot state a claim upon which relief may be granted.
12 (Def.’s Mot. at 1).²

A. Failure to meet pleading standards

14 Rule 8 requires “a short and plain statement of the claim showing that the pleader is
15 entitled to relief.” Fed. R. Civ. Pro. 8(a)(2). Here, the complaint does not even provide a
16 formulaic recitation of the elements of each cause of action, which would still be insufficient to
17 withstand a motion to dismiss under Rule 12(b)(6). *See Twombly*, 550 U.S. at 555. Instead,
18 Plaintiffs appear to have copied and pasted sections of the pertinent statutes with scant
19 information as to how Defendant’s actions constitute a cognizable claim.

20 Further, all of Plaintiffs’ causes of action reallege the preceding paragraphs without
21 identifying which facts relate to which causes of action, leaving the Court to guess which facts
22 pertain to which causes of action. Accordingly, as currently pled, the complaint is wholly
23 insufficient and fails to comply with the *Iqbal-Twombly* pleading standard. Nonetheless, even if
24 Plaintiffs were granted leave to amend the complaint, their causes of action fail for the reasons set
25 forth below.

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² While venue is improper in the U.S. District Court for the Northern District of California,
28 because the property is located in Riverside County, the Court will address Defendant’s Rule
12(b)(3) argument should Plaintiffs file a motion for leave to file an amended complaint.

1 **B. Judicial Notice**

2 Defendant asks that the Court take judicial notice of a number of documents in
3 support of its motion to dismiss. (Def.’s Req. for Judicial Not., “RJN,” Dkt. No. 6.) The
4 documents are purportedly true and correct copies of: A) a Deed of Trust, recorded in the
5 Riverside County Recorder’s Office on August 17, 2004; B) Grant Deed, recorded in the
6 Riverside County Recorder’s Office on July 3, 2006; C) Capital One Financial Corporation’s
7 10-Q Form, filed with the U.S. Securities and Exchange Commission, dated September 30,
8 2009; D) an Assignment of Deed of Trust recorded with the Riverside County Recorder’s
9 Office on May 10, 2012, naming Capital One as the new beneficiary under the Deed of
10 Trust; E) a Substitution of Trustee, recorded with the Riverside County Recorder’s Office on
11 May 10, 2012; F) a Notice of Default, recorded on May 14, 2012 with the Riverside County
12 Recorder’s Office; G) a Notice of Trustee’s Sale, recorded on August 17, 2012 with the
13 Riverside County Recorder’s Office; H) a Notice of Rescission of Notice of Default,
14 recorded on August 23, 2012 with the Riverside County Recorder’s Office; I) a Notice of
15 Default, recorded on October 18, 2013 with the Riverside County Recorder’s Office; J)
16 Voluntary Petition in Plaintiffs’ Bankruptcy proceeding, filed on November 26, 2013; K)
17 Order and Notice of Dismissal entered on December 20, 2013, and Order and Notice of
18 Dismissal entered on January 17, 2014 in the O’Connor Bankruptcy; and L) complaints filed
19 in the six O’Connor civil actions.

20 Plaintiffs’ opposition does not directly address Defendant’s request for judicial
21 notice, although it appears that they may generally dispute the authenticity of the exhibits as
22 they “den[y] defendants (sp?) reference to any pertinent facts....” (*See* Pl.’s Opp’n at 3.) It is
23 unclear on what grounds Plaintiffs could challenge the authenticity of these exhibits, as
24 courts routinely take judicial notice of these types of documents.

25 Accordingly, the Court finds that Exhibits A through I are true and correct copies of
26 official public records, whose authenticity is capable of accurate and ready determination by
27 resort to sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b).
28 The Court will also take judicial notice of Exhibits J through K, because they are true and

1 correct copies of court records. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.
2 1980).

3 For the reasons set forth above, Defendant's Request for Judicial Notice is
4 GRANTED.

5 **C. Motion to Dismiss pursuant to Rule 12(b)(6)**

6 Capital One seeks to dismiss all claims under Rule 12(b)(6) on the grounds that Plaintiffs
7 cannot state a claim for which relief may be granted. (Def.'s Mot. at 2.)

8 1. Fair Debt Collections Practices Act (Claim 6)

9 Plaintiffs' sixth cause of action is for violations of the Fair Debt Collects Practices Act
10 ("FDCPA"), 15 U.S.C. § 1692. The FDCPA "prohibits 'debt collector[s]' from making false or
11 misleading representations and from engaging in various abusive and unfair practices." *Heintz v.*
12 *Jenkins*, 541 U.S. 291, 292 (1995). In order to establish a claim under the Fair Debt Collections
13 Practices Act, Plaintiffs must show: (1) that they are consumers within the meaning of 15 U.S.C.
14 §§ 1692a(3) and 1692c(d); (2) that the debt arises out of a transaction entered into for personal
15 purposes; (3) that the defendant is a debt collector within the meaning of 15 U.S.C. § 1692a(6);
16 and (4) that the defendant violated one of the provisions of the FDCPA, 15 U.S.C. §§ 1692a–
17 1692o. *Gutierrez v. Wells Fargo Bank*, C 08-5586 SI, 2009 WL 322915, at *2 (N.D. Cal. Feb. 9,
18 2009); *see Creighton v. Emporia Credit Service, Inc.*, 981 F. Supp. 411, 414 (E.D. Va. 1997).

19 Plaintiffs' claim that they are a "consumer" within the meaning of 15 U.S.C. §§ 1692a(3)
20 and 1692c(d), and that the debt arises out of a transaction incurred for household purposes,
21 presumably because it concerns the purchase of real property. (*See* Compl. ¶ 34.) Defendant does
22 not challenge these allegations, but instead argues that Plaintiffs' FDCPA claim fails for two
23 reasons: (1) that Defendant is not a "debt collector" within the meaning of the statute, and (2) a
24 foreclosure proceeding on a property pursuant to a deed of trust is not the collection of a debt
25 within the meaning of the FDCPA. (Def.'s Mot. at 11-12; Def.'s Reply at 3-5.) The Court finds
26 Defendant's arguments to be persuasive.

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1 a. *Defendant is not a “debt collector” under the FDCPA*

2 Plaintiffs allege that Defendant is a “debt collector” under the FDCPA, and that Defendant
3 violated the statute through its efforts to collect payment pursuant to the Subject Property’s deed
4 of trust. (Compl. ¶ 34.)

5 In order to be liable under the FDCPA, Defendant must fall within the statutory definition
6 of “debt collector” and have been engaged in the collection of a debt. *Gutierrez*, 2009 WL
7 322915, at *2; *see Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1198–99 (C.D. Cal. 2008).
8 A “debt collector” is defined as (1) “any person who uses any instrumentality of interstate
9 commerce or the mails in any business the principal purpose of which is the collection of any
10 debts, or (2) who regularly collects or attempts to collect, directly or indirectly, debts owed or due
11 or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).

12 Here, Plaintiffs argue that they never entered into a contract with Defendant, so Defendant
13 must be classified as a debt collector under the FDCPA. (Pl.’s Opp’n at 3.) Defendant contends
14 that it is not a debt collector, but rather a creditor and so is exempt from liability under the
15 FDCPA if it is not also a “debt collector.” (Def.’s Mot. at 11.) Under the FDCPA, a creditor is
16 one who “offers or extends credit creating a debt or to whom a debt is owed.” 15 U.S.C. §
17 1692a(4). The Ninth Circuit, while rejecting the *per se* rule adopted by other Courts of Appeal
18 that a creditor cannot be debt collectors, has held that a plaintiff “must plead factual content that
19 allows the court to draw the reasonable inference’ that [Defendant] is a debt collector.” *Schlegel*
20 *v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1208 n. 2. (9th Cir. 2013).

21 Plaintiffs fail to allege sufficient facts to plead that Defendant is a debt collector, because
22 the complaint does not expressly state that the “principal purpose” of Defendant’s business is debt
23 collection, or that Defendant regularly collects or attempts to collect, debts owed or due another.
24 Nor do Plaintiffs plead facts showing that Capital One was assigned a defaulted loan for the
25 purposes of debt collection, which is generally required for a finding of debt collector status under
26 the FDCPA. *Brown v. U.S. Bank Nat'l Ass'n*, C12-04587 HRL, 2013 WL 4538131, at *3 (N.D.
27 Cal. Aug. 23, 2013); *see also Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1053 (E.D. Cal.
28 2009) (citing *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir.1985)).

1 Further, Defendant is the successor in interest to Chevy Chase Bank, Plaintiff Jo Ann
2 O'Connor's original lender, and was assigned Chevy Chase's interest in the Subject Property on
3 May 10, 2012. (Def.'s Mot. at 12; RJD, Ex. D.) This transfer of interest occurred prior to
4 Plaintiffs' loan entering default status on October 18, 2013. (Def.'s Mot. at 12; RJD, Ex. I.)

5 As provided above, Plaintiffs' cause of action is not only conclusory, but also fails to state
6 sufficient facts to allege that Defendant is a "debt collector" under the FDCPA. To the contrary,
7 Defendant is not a "debt collector" for the purposes of the FDCPA, because it owned Plaintiffs'
8 residential mortgage loan, and its primary purpose is not debt collection.

9 b. *Foreclosing on a property pursuant to a deed of trust is not debt collection*

10 Even if Defendant were a "debt collector," non-judicial foreclosure proceedings do not fall
11 within the purview of the FDCPA. *See, e.g., Rockridge Trust v. Wells Fargo, N.A.*, C-13-01457
12 JCS, 2013 WL 5428722, at *13 (N.D. Cal. Sept. 25, 2013) (citing *Natividad v. Wells Fargo Bank*,
13 N.A., No. 3:12-cv-03646, 2013 WL 2299601, at *5-9 (N.D. Cal. 2013); *Ligon v. JP Morgan*
14 *Chase Bank*, No. C 11-2504, 2011 WL 2550836, at *3 (N.D. Cal. June 27, 2011)). The Subject
15 Property is being foreclosed upon pursuant to a deed of trust, and Defendant, rather than
16 collecting a debt owed to another, is merely enforcing its own security interest as the lender.

17 Accordingly, Defendant is shielded from FDCPA liability, and the FDCPA cause of action
18 is dismissed without leave to amend, because any amendment would be futile.

19 2. Fair Credit Reporting Act (Claim 1)

20 Plaintiffs' first cause of action is for the violation of the Fair Credit Reporting Act
21 ("FCRA"). Plaintiffs contend that Defendant failed to delete inaccurate information on their
22 credit report, to investigate his disputes, and to follow reasonable procedures to maintain the
23 accuracy of their credit report. (Compl. ¶¶ 18-19.)

24 The FCRA imposes certain obligations on persons who furnish information to credit
25 reporting agencies ("CRAs"). *See* 15 U.S.C. § 1681s-2. Furnishers have an initial duty to provide
26 accurate information to CRAs, as well as an additional series of duties once a furnisher receives
27 notice from a CRA that a consumer disputes the accuracy of the furnisher's reporting. *See* 15.
28

1 U.S.C. §§ 1682s-2(a),(b). Plaintiffs allege violations of both duties, which the Court addresses
2 below.

3 a. *There is no private right of action under § 1681s-2(a).*

4 Plaintiffs allege that Defendant violated Section 1681s-2(a), which prohibits furnishers
5 from reporting information they know or have reason to believe is inaccurate. 15 U.S.C. § 1681s-
6 2(a)(1)(A); *Giovanni v. Bank of Am., Nat. Ass'n*, C 12-02530 LB, 2013 WL 1663335, at *5 (N.D.
7 Cal. Apr. 17, 2013). Consumers, however, have no private right of action against a furnisher of
8 false information under this subsection. *See Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d
9 1057, 1060 (9th Cir. 2002) (This limitation on liability and enforcement is reinforced by
10 subsection (d) of § 1681s-2, which provides that subsection (a) “shall be enforced exclusively
11 under section 1681s of this title by the Federal agencies and officials and the State officials
12 identified in that section.”); *see Giovanni*, 2013 WL 1663335, at *5; *Gens v. Wachovia Mortgage*
13 *Corp.*, 10-CV-01073-LHK, 2011 WL 1791601, at *7 (N.D. Cal. May 10, 2011) aff'd, 503 F.
14 App'x 533 (9th Cir. 2013).

15 Thus, Plaintiffs’ allegation that Defendant furnished false information to credit reporting
16 agencies is not, in itself, actionable under Section 1681 s-2(a), because it does not provide the
17 consumer with a private right of action. *Gens*, 2011 WL 1791601, at *7. Accordingly, Plaintiffs’
18 claim under § 1681s-2(a) is dismissed without leave to amend, as the lack of a private right of
19 action makes any further amendment futile.

20 b. *Plaintiffs’ claim under § 1681s-2(b) also fails.*

21 Plaintiffs, however, do have standing to pursue a claim under § 1681s-2(b). *See Nelson*,
22 282 F.3d at 1060. Subsection (b) provides consumers with a private right of action, which
23 imposes a series of duties once a furnisher receives notice directly from a CRA that a consumer
24 disputes the accuracy of the furnisher’s reporting. *Landini v. FIA Card Servs., Nat'l Ass'n*, C13-
25 01153 HRL, 2014 WL 587520, at *3 (N.D. Cal. Feb. 14, 2014). After receiving a notice of
26 dispute from a CRA, the furnisher must:

- 27 (A) conduct an investigation with respect to the disputed information;
28 (B) review all relevant information provided by the consumer reporting agency
 pursuant to section 1681(a)(2) of this title;

- (C) report the results of the investigation to the consumer reporting agency;
- (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis and;
- (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for the purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
 - (i) modify that item of information;
 - (ii) delete that item of information; or
 - (iii) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1).

While Plaintiffs may pursue a cause of action under subsection (b), their claim fails for two reasons. First, Plaintiffs have not sufficiently pled facts establishing that Defendant engaged in inaccurate credit reporting. *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010) (“Although the FCRA’s reinvestigation provision [in section 1681s-2(b)] . . . does not on its face require that an actual inaccuracy exist for a plaintiff to state a claim, many courts, including our own, have imposed such a requirement.”). As Defendant correctly points out, Plaintiffs’ complaint fails to provide any facts as to what negative information was reported, let alone the supposed inaccuracy. (Def.’s Mot. at 8; Compl. ¶¶ 9, 18, 22.) Instead, Plaintiffs allege only that they discovered that Defendant reported the alleged debt concerning the Subject Property to the credit bureaus. (Compl. ¶ 9.) Plaintiffs’ allegation that they are “without specific knowledge and evidence” of the “loan, mortgage, and or Deed of Trust” is conclusory, and does not sufficiently put Defendant on notice of what was allegedly inaccurate about the reporting. See *Iyigun v. Cavalry Portfolio Servs., LLC*, CV-12-8682-MWF JEMX, 2013 WL 950947, at *1 (C.D. Cal. Mar. 12, 2013) (“The plain allegation that ‘the accounts do not belong to’ [the plaintiff] does not provide [the defendant] sufficient notice of the claims against it because it does not sufficiently identify the inaccuracies of the alleged reporting.”); *Engler v. ReconTrust Co.*, No. CV12-1165, 2013 U.S. Dist. LEXIS 179950, at *20-21 (C.D. Cal. Dec. 20, 2013).

1 Second, even if Plaintiffs sufficiently allege which information was inaccurately reported,
2 Plaintiffs bears the burden of showing that Defendant's investigation was unreasonable. *Gorman*
3 *v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1154 (9th Cir. 2009). Plaintiffs allege that they
4 reported the purported inaccuracies in their credit report to the CRAs and to Defendant, and that
5 Defendant "failed to delete information found to be inaccurate and erroneous, and/or failed to
6 properly investigate Plaintiff[s'] disputes" and failed to conduct a proper and lawful
7 reinvestigation. (Compl. ¶¶ 18-19.) Plaintiffs, however, fail to offer any factual allegations
8 supporting their contention that Defendant's investigation of their disputed account was
9 unreasonable. See *Berberyan v. Asset Acceptance, LLC*, CV 12-4417-CAS PLAX, 2013 WL
10 1136525, at *5 (C.D. Cal. Mar. 18, 2013) (allegation that furnisher "fail[ed] to conduct a proper
11 investigation" was insufficient to state a section 1681s-2(b) claim.); *Iyigun*, 2013 WL 950947 at
12 *1. Essentially, what Plaintiffs offer is a mere label, conclusion, and a formulaic recitation of the
13 elements of this cause of action, and this is insufficient to survive a motion to dismiss. *Twombly*,
14 550 U.S. at 555.

15 Moreover, Plaintiffs' contention that they do not owe the debt in question is implausible,
16 as is their contention that Defendant is not a legitimate creditor, in light of the judicially noticed
17 documents. Thus, Plaintiffs' cause of action under § 1681s-2(b) fails as a matter of law and is
18 dismissed.

19 c. *Other FCRA allegations*

20 Plaintiffs also contend that Defendant violated 15 U.S.C. § 1681e(b). (Compl. ¶ 19.)
21 Section 1681e(b), however, only applies to consumer reporting agencies, not furnishers. As
22 Defendant is not a CRA, and Plaintiffs do not name any reporting agencies as defendants in this
23 action, this allegation also fails.

24 Finally, Plaintiffs allege that Defendant's actions "were done in malice, were done
25 willfully, and were done with either the desire to harm Plaintiff[s] and/or with the knowledge that
26 their actions would very likely harm Plaintiff[s] and/or their actions were taken in violation of the
27 FCRA and state law and/or they knew or should have known that their actions were in reckless
28 disregard of the FCRA and state law." (Compl. ¶ 20.) As stated above, however, Defendant is a

1 creditor and successor-in-interest to Plaintiffs' original lender. (See RJD, Ex. D.) As a creditor,
2 Defendant had the right to run Plaintiffs' credit and to report that Plaintiffs were behind in their
3 payments. Therefore, Plaintiffs' argument that these actions were unlawful and were done
4 maliciously, and with reckless disregard is unpersuasive.

5 Accordingly, Plaintiffs' FCRA cause of action is dismissed, but since Plaintiffs could
6 possibly allege additional facts demonstrating how the investigation of the disputed debt was
7 insufficient, the claim is dismissed without prejudice.

8 3. Invasion of Privacy (Claim 3)

9 In their third cause of action, Plaintiffs allege that Defendant violated his federal and state
10 constitutional rights to privacy by unlawfully and illegally obtaining proprietary, confidential, and
11 personal information, including Plaintiffs' social security number. (Compl. ¶ 26.) Plaintiffs
12 further contend that they have "a right to discovery" to determine where Defendant obtained their
13 personal information. (*Id.* at ¶ 27.)

14 a. *Federal right to privacy*

15 Plaintiffs maintain that they have an enumerated right to privacy under the U.S.
16 Constitution. (Compl. ¶ 26.) There is no such enumerated right to privacy. *Roe v. Wade*, 410
17 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right to privacy.").³ As
18 a result, this claim, to the extent it is based on federal law, fails and is subject to dismissal without
19 leave to amend.

20 b. *State law invasion of privacy claims*

21 Defendant contends that Plaintiffs fail to plead sufficient facts to establish any of the
22 elements necessary to state a claim for invasion of privacy. (Def.'s Mot. at 9-10.) The right of
23 privacy articulated in Article 1, Section 1 of the California Constitution "protects an individual's

24 ³ Even if Plaintiffs were to rely on the personal zone of privacy recognized in *Roe v. Wade*, it does
25 not embrace the purported privacy interest Plaintiffs seeks to protect here, i.e., the interest in
26 being free from allegedly unlawful and illegal procurement of proprietary, confidential, and
27 personal information, including his social security number. See, e.g., *Roe*, 410 U.S. at 153 (right
28 to privacy protects a woman's right to have an abortion); *Stanley v. Georgia*, 394 U.S. 557, 569
(1969) (right to privacy protects the possession and viewing of child pornography in one's own
home); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to privacy protects freedom to marry or
not marry).

1 reasonable expectation of privacy against a serious invasion.” *Khalilpour v. CELLCO P’ship*, C
2 09-02712 CW MEJ, 2010 WL 1267749, at *3 (N.D. Cal. Apr. 1, 2010) (citing *Hill v. National*
3 *Collegiate Athletes Assn.*, 7 Cal.4th 1, 36-37, (1994)). A party claiming a violation of the
4 constitutional right of privacy established in article I, section I of the California Constitution must
5 establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the
6 circumstances, and (3) a serious invasion of the privacy interest. *Heidorn v. BDD Mktg. & Mgmt.*
7 *Co., LLC*, 2013 U.S. Dist. LEXIS 177166, at * 35-38 (N.D. Cal. Aug. 19, 2013) (citing *Int’l Fed’n*
8 *of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319,
9 338, (2007)).

10 Defendant does not dispute that Plaintiffs have a legally protected interest in the privacy
11 of their social security information and a reasonable expectation of privacy in that information.
12 Defendant, however, explains that it has access to Plaintiffs’ personal information, because it is
13 their lender. (See Def.’s Mot. at 10.) Thus, Plaintiffs’ assertion that Defendant unlawfully and
14 illegally breached their personal information because they have never “applied for or received
15 credit or any other services from Defendant” is contradicted by the judicially noticeable
16 documents establishing his debtor-creditor relationship with Defendant’s predecessor, Chevy
17 Chase Bank. (Compl. ¶¶ 25-26; RJD, Ex. D.)

18 c. *FCRA preemption*

19 Additionally, Defendant argues that even if Plaintiffs could sufficiently plead an invasion
20 of privacy claim, it fails because it is preempted to the extent that it is premised on Defendant’s
21 alleged duties under the FCRA. (Def.’s Mot. at 10.)

22 Courts have interpreted § 1681t(b)(1)(F) “to preclude all state common law and statutory
23 claims, to effect Congress’ intent to limit a plaintiff’s recovery against furnishers of credit
24 information to only the remedies provided under the FCRA.” *Miller v. Bank of Am., Nat. Ass’n*,
25 858 F. Supp. 2d 1118, 1124 (S.D. Cal. 2012). Courts have also recognized the tension between §
26 1681t(b)(1)(F) and § 1681h(e), which suggests that a plaintiff can maintain claims for defamation,
27 invasion of privacy, or negligence against a furnisher of credit information when the plaintiff
28 alleges that the furnisher provided “false information . . . with malice or willful intent to injure . . .

1 . " *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1166 (9th Cir. 2009) ("Attempting to
2 reconcile the two sections has left district courts in disarray.").

3 Here, Plaintiffs' cause of action relies on Defendant's purported status as a "debt
4 collector." (See Compl. ¶¶ 25-26.) In this respect, Defendant's alleged invasion of privacy, i.e.,
5 using Plaintiffs' social security number to report purportedly inaccurate information to credit
6 reporting agencies, is regulated by federal law and as such, would be preempted by the FCRA.

7 Nonetheless, even if Plaintiffs' invasion of privacy claim were not preempted, Plaintiffs
8 cannot state a viable claim for relief. Accordingly, Plaintiffs' cause of action for invasion of
9 privacy is dismissed without leave to amend, because any amendment would be futile.

10 4. Negligent, Wanton, and/or Intentional Hiring and Supervision of Incompetent
11 Employees or Agents (Claim 4)

12 Plaintiffs' fourth cause of action for negligent, wanton, and/or intentional hiring and
13 supervision alleges that:

14 Defendant [] was aware of [its] wrongful conduct in creating an alleged debt
15 Plaintiffs are not obligated to, . . . Defendant knew and approve[d] of its
16 incompetent employee and agents . . . against [] Plaintiff[s]. Defendant []
negligently and/or intentionally, hired, trained, retrained, and/or supervised
incompetent debt collectors.

17 (Compl. ¶ 30.) Plaintiffs argue that they suffered "substantial damages" as a result of Defendant's
18 negligent hiring and/or supervision. *Id.*

19 Under California law, an employer can be liable for negligently hiring, supervising or
20 retaining an unfit employee. *Inzerillo v. Green Tree Servicing LLC*, 13-CV-06010-MEJ, 2014 WL
21 1347175, at * 6 (N.D. Cal. Apr. 3, 2014) (citing *Doe v. Capital Cities*, 50 Cal. App. 4th 1038,
22 1054 (1996)). The rationale for imposing liability is that "if an enterprise hires individuals with
23 characteristics which might pose a danger to customers or other employees, the enterprise should
24 bear the loss caused by the wrongdoing of its incompetent or unfit employees." *Inzerillo*, 2014
25 WL 1347175, at *6 (citing *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998)).
26 Such liability will be imposed on an employer if it "knew or should have known that hiring the
27 employee created a particular risk or hazard and that particular harm materializes." *Phillips v.*
28

1 *TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 1139, 91 Cal. Rptr. 3d 864, 868 (2009) (citing *Doe*,
2 50 Cal. App. 4th at 1054).

3 Defendant contends that Plaintiffs' allegations are wholly conclusory and that, under
4 California law, "a financial institution owes no duty of care to a borrower when [its] involvement
5 in the loan transaction does not exceed the scope of its conventional role as a mere lender of
6 money." (Def.'s Mot. at 10.) The Court agrees. In their complaint, Plaintiffs fail to plead any
7 facts to establish that Defendant owed him a duty of care, as they does not name specific
8 employees, does not identify the alleged incompetence, or otherwise describe the conduct giving
9 rise to this cause of action.

10 Additionally, Plaintiffs' cause of action is premised on the alleged debt collection being
11 wrongful conduct. (Compl. ¶ 30.) As discussed above, Defendant is not a debt collector under the
12 FDCPA, so any alleged conduct undertaken by Defendant's employees is not wrongful.

13 To the extent that Plaintiffs may be able to allege additional, non-conclusory facts in
14 support of this cause of action, and identify a particularized harm that resulted from an individual
15 employee, this cause of action is dismissed without prejudice.

16 IV. CONCLUSION

17 For the reasons set forth above, the Court GRANTS Defendant Capital One's request for
18 judicial notice. The Court further GRANTS Defendant's motion to dismiss Plaintiffs' complaint
19 with prejudice as to Plaintiffs' FDCPA and invasion of privacy claims. Plaintiffs' FCRA and
20 negligent hiring claims are dismissed without prejudice.

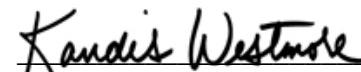
21 If Plaintiffs are able to amend their complaint to allege non-conclusory facts supporting
22 his remaining causes of action, they may file a motion for leave to file an amended complaint
23 consistent with this order. The motion for leave to amend must be filed within thirty (30) days of
24 this order, and must include a copy of the proposed First Amended Complaint attached as an
25 exhibit. Plaintiffs should not file a motion if they cannot sufficiently allege a viable cause of
26 action. If Plaintiffs do not file a motion for leave to amend to file an amended complaint, the
27 Court will dismiss the action with prejudice.

28 ///

1 Plaintiffs may wish to consult a manual the Court has adopted to assist *pro se* litigants in
2 presenting their case. This manual, and other free information, is available online at:
3 <http://cand.uscourts.gov/proselitigants>. Plaintiffs may also wish to contact the Federal Pro Bono
4 Project's Help Desk—a free service for *pro se* litigants—by calling (415) 782-8982.

5 IT IS SO ORDERED.

6 Dated: May 29, 2014


7 KANDIS A. WESTMORE
8 United States Magistrate Judge